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NO. 80-811

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN LONG, JANICE LONG and JACKSON COUNTY EMERGENCY MEDICAL SERVICES, INC., D/B/A PAS-POINT AMBULANCE SERVICE,

Petitioners

v.

LARRY ARCELL, TIMOTHY F. KRIEHN, ROBERT ELLZEY, and THE SOUTH MISSISSIPPI SUN and THE BILOXI HERALD, D/B/A THE SATURDAY SUN HERALD, and GULF PUBLISHING CO., INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a standard for the determination of actual malice, which prevents a public figure defamation plaintiff from recovery where there is evidence of knowing and reckless falsity, conflicts with the decisions of this Court.

2. Whether a stipulation of law that defamation plaintiffs are public figures, made in the District Court prior to this Court's decision in Hutchinson v. Proxmire, 443 U.S. 111 (1979), is binding on the Court of Appeals, so as to prevent its determination of the public or private figure status of such plaintiffs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, John Long, Janice Long, and Jackson County Emergency Medical Services, Inc., d/b/a Pas-Point Ambulance Service, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 13, 1980, upon which rehearing was denied August 20, 1980.

OPINION BELOW

The opinion of the Court of Appeals, Long v. Arcell, 618 F.2d 1145 (5th Cir.), rehearing denied, F. 2d (5th Cir.), appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of Mississippi.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 13, 1980. A timely petition for rehearing and rehearing en banc was denied on August 20, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254 (1) (1966).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the first amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This is a defamation action, which arose from the publication by the defendants (respondents herein), of a newspaper article (appearing in the appendix hereto) alleging illegal conduct on the part of the plaintiffs (petitioners herein), in the operation of an ambulance service. The jurisdiction of the district court was invoked under 28 U.S.C.A. Sec. 1332 (1966, Supp. 1980), because of diversity of citizenship, the plaintiffs being citizens of Alabama and the defendants being citizens of Mississippi.

The plaintiffs, prior to the events here at issue, had been in the ambulance business in Alabama for 12 years. (R-22) In February, 1976, an emergency situation existed in Jackson County, Mississippi, due to the withdrawal from the eastern part of that county of the only ambulance service serving the area. (R-18) The plaintiffs were requested by the Jackson County Board of Supervisors to furnish a proposal for the provision of ambulance service in the affected area, which proposal was accepted on February 12, 1976, for the start of service on the following day, February 13. (R-23) On February 18, the plaintiffs were visited by Michael Shumaker, a field representative of the Emergency Medical Services Division of the State Board of Health. (R-198) Mr. Shumaker,

at that time, authorized the plaintiffs to operate their ambulance service in Mississippi. (R-202, 242) A document evidencing the plaintiffs' right to operate was issued on March 31. The distinction between the authority to operate, issued February 18, and the document showing proof that such license was in fact issued, was explained (R-268) by Doyle Bradshaw, Mr. Shumaker's superior, and Coordinator of the Division. (R-254) The defendants apparently reject such distinction.

On May 7, 1976, the plaintiffs received a telephone call from defendant Larry Arcell, then a reporter for the defendant newspaper publisher (R-96), who was referred to plaintiffs' attorney, William Roberts Wilson, Jr. (R-382) Mr. Wilson, in five separate conversations with Arcell, or with defendant Robert Ellzey, also a reporter for the defendant, explained to the defendants that their proposed story, containing the allegation that the plaintiffs had been operating from February 13 to March 31 without a license, was false. (R-382-85, 435, 616-18)

The defendants based their decision to publish, in the face of such denials, on information allegedly obtained from the two state officials, Shumaker and Bradshaw (R-386), although neither reporter doubted that Mr. Wilson was telling the truth. (R-390, 451) Both state officials testified that they advised the reporters that the plaintiffs were licensed on February 18. (R-208, 254) Defendant Arcell stated that there was no urgency involved in publishing the article. (R-356)

The article was published while the plaintiffs were in

the process of applying to extend their ambulance operations into a neighboring Mississippi county. (R-465) Defendant Arcell was philosophically opposed to the operation of ambulance services by any private individuals. (R-419) Three expert witnesses testified that the defendants had engaged in irresponsible journalistic practice in publishing the article under the circumstances, and that there were obvious reasons to doubt the accuracy of the information on which the article was based. (R-490, 524, 548, 552)

The case was tried, and went to the jury, on the theory that the plaintiffs were public figures, based on the concession of such fact by the plaintiffs, and the district judge's statement that he would have so held regardless of the concession. (R-579) Following a verdict for the plaintiffs, the district court entered a judgment n.o.v. for the defendants.

REASONS FOR GRANTING THE WRIT

1. THE FIFTH CIRCUIT HAS APPLIED A STANDARD FOR THE DETERMINATION OF THE EXISTENCE OF ACTUAL MALICE IN A NEW YORK TIMES DEFAMATION ACTION WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT, AND WITH DECISIONS OF THE OTHER CIRCUIT COURTS.

From the landmark decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to the present this Court has consistently held and recognized that there are two sides to the New York Times rule requiring a showing of actual malice, defining a statement made with actual malice

as one made "with knowledge that it was false, or with reckless disregard of whether it was false or not," 376 U.S. at 279-80. While this Court has vigilantly monitored defamation cases to prevent any drawing back from the principle that such cases must be considered

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials.

Id. at 270, it has also consistently adhered to the equally fundamental principle, stated in Garrison v. Louisiana, 379 U.S. 64 (1964), that:

> (T)he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. at 75.

The decision of the Fifth Circuit, while admittedly citing the applicable rules, has ignored this later principle, the other side of the New York Times coin, and in so doing, has set up an actual malice standard which is, in effect, in conflict with the decisions of this Court. It is to give vitality to the principle that the knowing, or reckless, falsehood enjoys no constitutional protection, that certiorari should be granted here. This is an issue with importance reaching far beyond the facts of, and parties to, this case. It affects every public official and public figure defamation plaintiff, who, if the decision of the Fifth Circuit is allowed to stand, will be deprived of a remedy for knowing and

reckless falsehood, in clear contradiction of the repeated holdings of this Court.

In considering the record on which the court below inexplicably held that there was no clear and convincing evidence that the defendants knew that their information was incorrect or that they had a high degree of awareness of its probable falsity, 618 F.2d at 1148, the Court's attention is respectfully called to its holding in New York Times that:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.

376 U.S. at 285. It has similarly been held:

> (I)n cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review "the evidence in the...record to determine whether it could constitutionally support a judgment" for the plaintiff.

Time, Inc. v. Pape, 401 U.S. 279, 285, rehearing denied, 401 U.S. 1015 (1971), quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951). Accord, e.g., Greenbelt Publishing Co. v. Bresler, 398 U.S. 6, 11 (1970). Since the discussion of the record in the opinion of the court below does not adequately set out the evidence which clearly and convincingly supports a finding of New York Times actual malice, the Court's attention is directed at this point to the key sections of the record.

The most significant proof that the defendants, at best, could not have been without serious doubt about the truth or falsity of the statment, and which provides strong evidence of knowing falsehood, is the testimony of the two state officials, Shumaker and Bradshaw. The defendants relied on these officials as their sole sources for their allegation that the plaintiffs were operating without a license. Yet both testified to having told the reporter that the plaintiffs were licensed as of February 18. Mr. Shumaker testified:

> Q. All right, sir, did you tell Mr. Arcell when the license was issued, on that phone call?
>
> A I believe I told Mr. Arcell that I gave them approval to operate.
>
> Q All right, sir.
>
> A I did not say when a document might have been issued showing that they were in accordance with us, approved to operate.
>
> Q Did you ever tell him that they were licensed on March 31st?
>
> A I don't believe so, no, sir.
>
> Q Would you have had any reason to?
>
> A No, Sir.

(R-208) (emphasis added). Mr. Bradshaw testified:

> Q Did you tell Mr. Arcell that the license was issued February 18th, 1976?
>
> A Yes.

(R-272) (emphasis added). Mr. Bradshaw further testified:

Q Is there any possibility that you would have told him, "Our records reflect that Pas-Point Ambulance Service operated for six weeks without a license"?

A No.

Q Is there any possibility that you would have told him any other license date other than February the 18th, 1976?

A No, I would not.

Q Is there any possibility you told him that you gave them a temporary license?

A No.

(R-274-75) It should be noted that the Fifth Circuit's statement that Shumaker's conversation with Arcell "occurred after the article was published," 618 F.2d at 1148, is not supported by the record. While the record is not as clear as it could be as to the sequence of events, it does clearly show that the conversation between Arcell and Shumaker occurred prior to the May 15 publication date. This is indicated by Arcell's own testimony, in which, while indicating his alleged belief that Shumaker supported his version of the facts, he states that he talked to Shumaker before, and not after, his final discussion with Mr. Wilson:

Q [By Mr. Wilson] And thereafter I did not talk to you about this any more.

A No, you never did. That was the last time we talked about it.

Q And you never called Jackson to double-check

the facts after that, or recheck them?

A Mr. Bradshaw and Mr. Shumaker both worked for the state and I didn't think that they would be lying to me.

Q Did you think I was lying to you?

A No, Sir.

Q And I told you they had a license?

A Yes, Sir.

(R-386)

The above testimony is also valuable for its admission that Arcell believed Mr. Wilson's statement that the plaintiffs had a license. Defendant Ellzey similarly testified that he had no reason to doubt Mr. Wilson's statement that the plaintiffs were licensed:

Q Did you have any reason to doubt the accuracy of what I told you about the license?

A Not particularly.

Q Did you have any reason to doubt that it was the truth when I told you the license was issued in February?

A I believe that's what you thought.

Q Did you ever recheck it after I disputed that with you?

A No, Sir, I did not.

Q Did you ever, yourself, talk with anybody with the state licensing authorities?

A No, Mr. Arcell did that work.

Q So, you were relying entirely on his work

in that regard?

A Yes, Sir, I sure did.

(R-451)

In light of such evidence, it is respectfully contended that the opinion of the court below negates the basic principle, stated by this Court in Linn v. United Plant Guard Workers, 383 U.S. 53 (1966), that:

> [I]t must be emphasized that malicious libel enjoys no constitutional protection in any context...

383 U.S. at 63.

The conduct of the defendants in the case at bar is closely analgous to that of the publisher in Curtis Publishing Co. v. Butts, 388 U.S. 130, rehearing denied, 389 U.S. 889 (1967), and the decision of the court below is in conflict with that case. In Butts, the defendant magazine publisher printed an article in which the plaintiff, a college football coach, was accused of "fixing" a football game. While holding such plaintiff a public figure subject to the New York Times rule, the Court held that the requisite standard of actual malice had been met, and affirmed a judgment awarding actual and punitive damages. 388 U.S. at 156. After pointing out, inter alia, that the Butts defendant had published the defamatory story at issue with knowledge that its sole substantial source had a criminal record, the Court held:

> The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the

> sport. At trial, such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful expose' might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Id. at 158. It is emphasized that, in the instant case, the defamatory comments had been expressly repudiated by the defendants' sources, i.e., the state officials, and it is therefore unnecessary to rely upon the showing of actual malice by proof of extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers. Here, the defendants, on publication, knew not only that the alleged facts had been denied by the plaintiffs' counsel, which denial they admit they had no reason to doubt, but also by their only sources of such alleged facts.

The decision of the court below is also in conflict with the Second Circuit's decisions in Goldwater v. Ginzberg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049, rehearing denied, 397 U.S. 978 (1970), and Buckley v. Littel, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

In Goldwater, the crux of the libel action was the publication by the defendants during the 1964 presidential campaign of two magazine articles having the central theme, 414 F.2d 15 311, of the plaintiff's alleged infliction with serious mental disease. The court, in affirming a judgment for the plaintiff, rejected the assertion that the defamatory statement at issue was protected by the first amendment, citing New York Times for the proposition that: "False statements are protected only if they are honestly made..." Id. at 335. The Goldwater court found, as in the case at bar, many parallels between its case and Butts, supra, and held:

> The Goldwater article did not contain "hot news"; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques.

Id. at 339. It was further held:

> [T]hey persisted in their polling project despite warnings by reputable professional organizations that their techniques lacked validity; and, obviously, there was evidence as to whether there was a possible preconceived plan to attack Senator Goldwater regardless of the facts. This evidence, together with the other facts brought out at trial established that the appellants not only knowingly published defamatory statements but also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements.

Id. at 339-40 (footnote omitted). Allowing for the extreme conduct of the Goldwater defendants, admittedly not

present here, it nevertheless appears that the court below is in clear conflict with Goldwater in that it ignored the factor, relied upon by the Second Circuit, of the defendants' conduct in ignoring warnings, i.e., the statements of its own sources, that the statements it was to publish about the plaintiffs were false.

In Buckley, an action was brought by a public figure journalist against the author of a book in which he was accused, inter alia, of engaging in libelous journalism. The Second Circuit upheld, as to such defamatory statement, the district court's finding that it was made with actual malice. As in Goldwater, the Buckley court emphasized the element, ignored by the Fifth Circuit in this case, of the defendants' recklessness in making charges which they had reason to believe were false:

> As we read Judge Griesa's findings, he found that Littel's statement that Buckley engaged in libelous journalism was made with knowledge of its falsity or in reckless disregard of its truth or falsity, and this is a finding based in part upon credibility and demeanor which we cannot go behind. In this connection, we emphasize that Littel's testimony clearly indicated that he could recall no instances of Buckley's lies about people as matters of fact, and that the lies he had in mind were not "precise detailed lies" but rather lies on "a theoretical level" involving, as the record makes clear, Buckley's political opinions.

539 F.2d at 896 (emphasis added).

In Carson v. Allied News Co., 529 F. 2d 206 (7th Cir. where the crux of the plaintiff television entertainer's libel action was the charge that he had moved the site of

his television show from New York to Los Angeles so that he could be near the woman who allegedly had been the cause of the breakup of his first marriage, the Seventh Circuit, in reversing a summary judgment for the defendant, held that there was a jury question on actual malice. The court significantly held, in contrast to the Fifth Circuit's approach:

> In the catalogue of responsibilities of journalists, right next to plagiarism, which parts of the National Insider article seem to be, must be a canon that a journalist does not invent quotations and attribute them to actual persons. If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. In any event, St. Amant expressly gives as another example of reckless disregard for the truth any "product of [one's] imagination."

529 F.2d at 213, quoting St. Amant v. Thompson, 390 U.S 727 (1968). In view of the evidence that the instant defendants had been advised prior to publication, by their only sources for the defamatory statements here at issue, that the published statements were false, such statements can be regarded as the type of fabrication condemned by Carson, and the Fifth Circuit's decision, awarding first amendment protection to such fabrication, is in conflict with Carson.

In Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), cert. denied, 419

U.S. 872 (1974), cited and followed, along with Goldwater, in Carson, the plaintiffs, a labor organization and seven of its officers, sued a school board member for certain allegedly defamatory statements. The Ninth Circuit significantly held, in reversing a judgment for the defendant:

> In this case, Ysrael's own testimony as an adverse witness is enough to get the plaintiffs to the jury under the New York Times standards. He repeatedly admitted that he did not know whether what he said was true. He repeatedly admitted that he did nothing, or almost nothing, to verify his charges. As to most of his statements, he repeatedly admitted that he knew of no facts to support them; he either relied upon unspecified rumor or upon nothing at all. He simply asserted that he believed that what he said was true. Such an assertion is not enough to support a directed verdict in his favor. If it were, mere swearing could, as a matter of law, defeat any action to which the New York Times principles are applicable.

492 F. 2d at 439 (emphasis added). Here, the defendants' conduct, involving the publication of defamatory statements after having been told that they were false, provides even stronger evidence of New York Times actual malice.

The decision of the court below is also in conflict with another Ninth Circuit decision, Alioto v. Cowles Communications, Inc., 519 F.2d 777 (9th Cir.), cert. denied, 423 U.S. 930 (1975), on remand, 430 F. Supp. 1363 (N.D. Cal. 1977), aff'd, 623 F.2d 616 (9th Cir. 1980). In Alioto, the defendant published a magazine article which described alleged meetings between the

plaintiff, the mayor of San Francisco, and Mafia figures, and his alleged business dealings with such underworld figures. The court held, in reversing a judgment n.o.v. for the publisher:

> Our review of the record convinces us that the district judge fairly summarized the permissible inferences which a jury might draw from the evidence. Having found the evidence that LOOK's editors entertained doubts as to the truth of the Nut Tree allegations to be sufficiently clear and convincing in nature were the jury to decide questions of credibility and draw permissible inferences in Alioto's favor, the court was without power to award Cowles judgment notwithstanding the jury's failure to arrive at a verdict.

519 F. 2d at 781. On remand, it was held that the plaintiff had met his burden on the malice issue, and in affirming a judgment for the plaintiff, based on this finding, the Ninth Circuit held, quoting Herbert v. Lando, 441 U.S. 153 (1979), that:

> [I]t is beyond dispute that a trial judge may base a finding of subjective malice--that is, that the defendant "in fact entertained serious doubts as to the truth of his publication"--upon evidence that there were "obvious reasons to doubt the veracity of the informant or the accuracy of hs reports."

623 F. 2d at 620, quoting 441 U.S. at 156-57. See also Davis v. Schuchat, 510 F. 2d 731 (D.C. Cir. 1975), where the District of Columbia circuit held, in affirming a judgment for a public figure allegedly slandered by a journalist:

> The evidence was of two types: first, evidence that appellant fabricated his allegations and knew that he had no possible foundation for them; and, second, evidence that regardless of any possibility of good faith mistake by an uninformed person, appellant had acquired by the time he made the allegations sufficient information about appellee to know or to seriously suspect that his allegations were false.

510 F.2d at 735.

It is also pointed out to the Court that, in reaching the decision below, the Fifth Circuit is in conflict with its own decision in Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970), where the defendant, which published a picture of seven men seated in a restaurant, and described the gathering as a meeting of "top Cosa Nostra hoodlums," 427 F. 2d at 220, knew that the plaintiff, one of the men pictured, was in fact an attorney. It was held:

> [I]n light of the fact that all of the Time, Inc. employees knew that Ragano was an attorney, we think that a genuine issue of material fact exists as to whether Time's conclusion that Ragano could journalistically be referred to as a top Cosa Nostra hoodlum was made in good faith or with malice. Therefore, summary judgment was properly denied.

Id. at 221. Here, it identically appears from the record that the defendants knew that the statements at issue were false, or at least, entertained serious doubts about the accuracy of such statements.

As held in St. Amant v. Thompson, 390 U.S. 727

(1968), in order to support a finding of New York Times actual malice:

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. at 731. The St. Amant court further pointed out the distinction missed by the Fifth Circuit in this case:

> [T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 732 (emphasis added; footnote omitted). To permit the decision below to stand, in the light of the evidence on which it was based, would be widely construed as an abandonment of this standard, and a blurring of the line between communications which, although false, are entitled to first amendment protection, and those typified by the instant defendants' publication, which are, by reason of knowing or reckless falsity, not entitled to such protection.

Recent decisions of this Court demonstrate its awareness of the need to maintain such distinction, and prevent the New York Times rule from serving as a shield for knowing or reckless defamation. In Hebert v. Lando, supra, the Court pointed out that the progeny of New York Times stand as much for the right of defamed persons to recover for knowing or reckless defamation, as for the protection of defamation defendants. It was held that:

> At the same time, however, the Court has reiterated its conviction--reflected in the laws of defamation of all of the States--that the individual's interest in his reputation is also a basic concern.

441 U.S. at 169. In holding that public figure defamation plaintiffs have the right to inquire into the state of mind and editorial process of defendants, the Hebert court emphasized the importance of maintaining the right to recovery for defamation where New York Times actual malice is present:

> Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct, which respondents do not suggest, constitutional values will not be threatened .

Id. at 173 (emphasis added). It is respectfully suggested that the standard applied by the Fifth Circuit in this case goes far toward establishing such absolute privilege to defame by knowing and reckless conduct. Short of an unambiguous confession by the defendants, it is difficult to see how any record could more conclusively establish the existence of actual malice than that in the case at bar.

The Court's attention is further called to its dicta in Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979), where this Court called into question the "so-called rule," id., under which many courts, including the Fifth Circuit, e.g., Bon-Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970), have held that summary judgment might be the rule rather than the exception in determining whether public figure defamation plaintiffs had made an adequate showing of actual malice. The court noted that:

> The proof of "actual malice" calls a defendant's state of mind into question, New York Times Co. v. Sullivan [supra], and does not readily lend itself to summary disposition.

443 U.S. at 120 n. 9. While the question of summary judgment is of course not directly related to this case,

it is suggested that the basic principle there alluded to is at issue here, in that the standard applied by the court below, as does the summary judgment rule questioned in Hutchinson, in effect prevents public figure defamation plaintiffs from proving the existence of New York Times actual malice.

As held in Garrison v. Louisiana, supra:

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * *" Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L. Ed. 1031 [1942]. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. at 75 (emphasis added). It is respectfully contended that certiorari should be granted in this case so that the Court can correct the Fifth Circuit's misapplication of its actual malice standard, and remove the constitutional protection which the opinion below has awarded to the knowingly or recklessly false statements of these defendants.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT, AND OF THE OTHER CIRCUITS, AS TO THE EFFECT IN A UNITED STATES CIRCUIT COURT OF A PARTY'S STIPULATION OF LAW IN A DISTRICT COURT.

The Counsel for the plaintiffs did concede that the plaintiffs were public figures. (R-579) The district court instructed the jury, and reached its decision, on that basis, but did not rely exclusively on the stipulation, holding:

> That would have been the holding of the Court, incidentally, that is the position that I take, that they are public as opposed to private individuals or figures, so that the higher burden of proof is on the plaintiffs since they are public figures, than it would be if they were private figures, with reference to the question of libel.

(Id.) The district court thus properly recognized that the question of the determination of a defamation plaintiff's status as a public figure is one of law for the court. E.g., Rosenblatt v. Baer, 383 U.S. 75, 88 (1966). The Fifth Circuit however, declined to rule on the question of whether these plaintiffs were public figures, and thus subject to the New York Times actual malice rule. The court below treated the stipulation as binding, 618 F.2d at 1147, and refused to relieve the plaintiffs of such stipulation, holding that this Court's decisions in Hutchinson v. Proxmire, supra, and Wolston v. Reader's Digest Association, Inc., 443 U.S. 157 (1979), did not amount to a change in the law such as would justify relief. Id. at 1147 n. 2. It is respectfully asserted that the decision below is in conflict

with the decisions of this Court, and of the other circuits, which held that stipulations of law, as opposed to those of fact, are not binding on the courts.

It was held in Sanford's Estate v. Commissioner, 308 U.S. 39, rehearing denied, 308 U.S. 637 (1939), that: "We are not bound to accept, as controlling, stipulations as to questions of law." 308 U.S. at 59, citing Swift & Co. v. Hocking Valley Railway, 243 U.S. 281 (1917), where it was held, referring to a stipulation made by the parties:

> If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.

243 U.S. at 289 (footnote omitted).

In Ute Indian Tribe v. State Tax Commission, 574 F.2d 1007 (10th Cir.), cert. denied, 439 U.S. 965 (1978), it was held that the issues as to the boundaries of the plaintiff tribe's reservation, and as to what might constitute trust lands

> was a matter which required the proof of facts and of the application of law. It was not subject to a stipulation binding on the court in any manner.

574 F.2d at 1009. In Los Angeles Shipbuilding & Drydock Corp. v. United States, 289 F.2d 222 (9th Cir. 1961), it was held that "courts are not bound to accept, as controlling, stipulationsof the parties as to a question of law..." 289 F.2d at 231. Accord, e.g., Daugaard v. Hawkeye Security Insurance Co. , 239 F.2d 351 (8th Cir. 1956);

London-Butte Gold Mines Co. v. Commissioner, 116 F.2d 478 (10th Cir. 1940). In London-Butte, it was held by the Tenth Circuit:

> The stipulation was an erroneous stipulation of the legal effect of the admitted facts. A stipulation of that kind is not binding upon the court, and should be disregarded.

116 F.2d at 480.

The Fifth Circuit has reached an identical result, in Equitable Life Assurance Society v. McGill, 551 F.2d 978, 983 (5th Cir.), rehearing denied, 554 F.2d 1065 (5th Cir. 1977), and Marden v. International Association of Machinists & Aerospace Workers, 576 F.2d 576 (5th Cir. 1978), thus indicating that the court below failed to properly apply the controlling law of its circuit. The Marden court significantly made the point, implicit in each of the cited cases, that while a stipulation of fact is binding, although it may be set aside under some circumstances:

> However, a court is free to disregard stipulations if parties have spoken to "the legal effect of admitted facts...since the court cannot be controlled by agreement of counsel on a subsidiary question of law." Swift & Co. v. Hocking Valley Railway Co., 243 U.S. 281, 288-289, 37 S.Ct. 287, 290, 61 L.Ed. 722 (1917). Here, we consider a provision stipulated to require union membership. This is a statement of the effect of a contract, a legal conclusion that is not binding upon a court.

576 F.2d at 580. Therefore, it is not necessary to rely upon the principle, held inapplicable to the case by the court below, that:

> Where a stipulation is entered into under a mistake

> of law induced by the then existing state of case law, a taxpayer is entitled to be relieved of the effect of that stipulation if no prejudice results.

Logan Lumber Co. v. Commissioner, 365 F.2d 846, 855 (5th Cir. 1966). The question of whether these plaintiffs are public figures is one of law, and regardless of any mistake which might have been made in stipulating that they were public figures, prior to Hutchinson and Wolston, the duty was on the court to determine their status for New York Times purposes. The stipulation, whether erroneously made in the district court or rendered erroneous by this Court's holdings in Hutchinso and Wolston, should therefore have been disregarded, and it is submitted that certiorari should be granted in view of the conflict on this point between the decision below and the decisions of this Court, and other circuits.

The law which should have been applied is that prevailing at the time the court rendered its decision. Thorpe v. Housing Authority, 393 U.S. 268, 281 (1969). At the time the plaintiffs stipulated that they were public figures, March 3, 1978 (R-579), such belief, shared by the plaintiffs and the district judge, was a reasonable, if not necessary, construction of the then available case law. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), this Court repudiated the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), 418 U.S. at 346, and shifted the focus of inquiry from the nature of the public controversy at

issue to the position of the plaintiffs, and the question of whether they "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved...." Id. Neither Gertz nor Time, Inc. v. Firestone, 424 U.S. 448 (1976), directly controlled the status of the instant plaintiffs. However, a substantial body of authority developed in the lower federal courts in the period between Gertz and Hutchinson, in which businesses and the operators thereof, many of whom were clearly less affected with public interest than the plaintiffs' ambulance service, were held to be public figures. Steaks Unlimited, Inc. v. Deaner, 468 F. Supp. 779 (W.D. Pa. 1979); Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977); TransWorld Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D. C. 1976). Martin Marietta involved the activities of a government contractor. Hutchinson v. Proxmire, 579 F. 2d 1027 (7th Cir. 1978), rev'd, 443 U.S. 111 (1979) (decided by the Seventh Circuit subsequent to the date of the stipulation at issue), was a similar case.

If, therefore, the court below was correct in holding by implication that the plaintiffs could only be relieved of their stipulation on grounds of mistake of law indicated by the then existing state of the case law, it nevertheless erred in holding that there was no change in the law.

This Court's decision in Hutchinson, while not overruling or expressly limiting past authority, clearly left outside the definition of "public figure" a plaintiff who would have been within it under the weight of the post-Gertz authority.

The position of the plaintiff in Hutchinson is strongly analgous to that of the instant plaintiffs, as relevant to the New York Times public figure issue. The Hutchinson plaintiff was a recipient of federal funding for the research project which was the subject of Senator Proxmire's allegedly defamatory comments. It was held, however, that such factor was insufficient to support a finding of public figure status:

> Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure--a conclusion that our previous opinions have rejected....
>
> Moreover, Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures. Neither his application for federal grants nor his publications in professional journals can be said to have invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level....

> Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.

443 U.S. at 135-36. It is suggested that the Hutchinson holding applies to this case, rendering these plaintiffs to be private individuals. By relying solely on the stipulation, and refusing to consider such issue, the decision below conflicts with the decisions of this Court, and of other circuit courts, as cited above herein. It is requested that certiorari be granted on such ground.

CONCLUSION

It is the contention of the plaintiffs that they are not public figures, and that they therefore not be held to a standard of New York Times actual malice. In emphasizing the first reason for granting the writ, it is not the intention of the plaintiffs to minimize the importance of the second reason, and their right to obtain a determination on the merits of the public figure issue, but, rather, to recognize the overriding importance of the actual malice issue, as presented by this case in the context of this Court's maintenance of a proper balance between the conflicting principles of the New York Times rule. For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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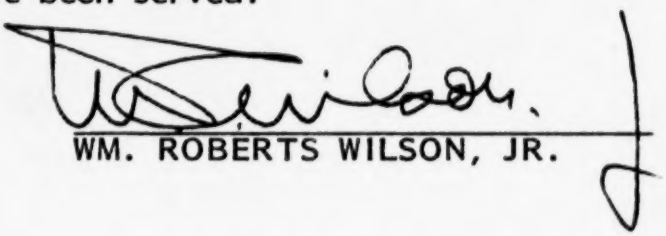
Counsel for Petitioners

[November 13, 1980]

CERTIFICATE OF SERVICE

I, Wm. Roberts Wilson, Jr., do hereby certify that I have this the 13TH day of November, 1980, mailed three copies of the above and foregoing Petition for Writ of Certiorari, through the United States mail, postage prepaid, to Mize, Thompson & Blass, Counsel for the Respondents, 310 Gulf National Building, Gulfport, Mississippi 39501. I further certify that all parties required to be served have been served.



WM. ROBERTS WILSON, JR.

APPENDIX

John LONG, Janice Long et al., Plaintiffs-Appellants,

v.

Larry ARCELL and Timothy F. Kriehn, Individuals et al., Defendants-Appellees.

No. 78-2401.

United States Court of Appeals, Fifth Circuit.

June 13, 1980.

Owners of ambulance service sued writers of newspaper article alleging that ambulance service had operated without obtaining a license. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., granted the writers' motion for judgment notwithstanding a verdict in favor of the owners and owners appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that the record did not contain clear and convincing evidence that the writers knew that their information was incorrect or had a high degree of awareness of its probable falsity.

Affirmed.

1. Courts ⇐96(5)

In libel suit, plaintiffs were bound on appeal by their trial court stipulation that they were public figures where Court of Appeals cases upon which they relied, and which were later reversed, did not change the law, but merely applied definition of public figure as it had been previously articulated by Supreme Court, and plaintiffs could not argue that they felt that district court was

bound by those Court of Appeals decisions, since decisions were from different circuits.

2. Libel and Slander ⇐51(5), 112(2)

Publisher acts with actual malice when he prints story with knowledge that it is false or with reckless disregard for truth and test of actual malice is not whether defendant acted as reasonable publisher would have acted under circumstances, but inquiry focuses on defendant's state of mind at time of publication; there must be clear and convincing evidence that defendant either knew that material was false or in fact entertained serious doubts as to its accuracy.

3. Federal Courts ⇐765

On appeal of judgment N.O.V. in libel suit involving public figure, Court of Appeals' review of district court's order is not as limited as in most cases where jury verdict has been set aside; although Court is not in position to judge credibility of witness, its duty to make independent examination of evidence and determine whether there was clear and convincing showing of actual malice.

4. Libel and Slander ⇐112(2)

In action by owners of ambulance service against writers of newspaper article, which stated that ambulance service operated without having obtained a license, record did not contain clear and convincing evidence that writers knew that their information was incorrect or had high degree of awareness of its probable falsity.

Appeal from the United States District Court for the Southern District of Mississippi.

Before SIMPSON, HILL and HATCHETT, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The plaintiff in this diversity libel suit are the owners of Pas-Point Ambulance Service. On February 13, 1976 Pas-Point began operating in Jackson County, Mississippi. This suit is based on an article that appeared in the May 15, 1976 edition of the Biloxi Sun Herald entitled "Pas-Point Ambulance may have violated law." The article states that Pas-Point operated from February 13 to March 31 without having obtained a license from the Emergency Services Division of the State Board of Health (EMS).

The jury returned a verdict in favor of the plaintiffs and awarded them actual and punitive damages. The defendants' motion for judgment N.O.V. and, in the alternative, a new trial, was sustained and the plaintiffs appeal. We affirm.[1]

[1, 2] We assume for purposes of this appeal that the article was materially

1. The district court's order does not state the grounds upon which the motion was sustained. Since we conclude that the order must be affirmed on the actual malice issue, there is no need for us to remand the case for a clarification of the order.

2. Plaintiffs argue that under the Supreme Court's recent decisions in *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) and *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), they are not pubic figures. These decisions were rendered after the trial. Plaintiffs contend that they relied on the Court of Appeals decisions in *Hutchinson* and *Wolston*, both of which were reversed by the Supreme Court. They request, therefore, that they be relieved of their stipulation and that we abide by the rule that an appellate court must apply the law in effect at the time it renders its decision.

false. We also must assume that the plaintiffs were public figures when the article was written, for their attorney so stipulated at trial.[2] In order for the plaintiffs to recover damages, therefore, they were required to prove by clear and convincing evidence that the defendants acted with actual malice as defined in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967). A publisher acts with actual malice when he prints a story with knowledge that it is false or with reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789, 806 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). The test of actual malice is not whether the defendant acted as a reasonable publisher would have acted under the circumstances. Rather, the inquiry focuses on the defendant's state of mind at the time of publication. *See Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 1641,

This is not a case of "a mistake of law induced by the then existing state of the case law." *Logan Lumber Co. v. Commissioner of Internal Revenue*, 365 F.2d 846, 855 (5th Cir. 1966). First, *Hutchinson* and *Wolston* did not change the law; they merely applied the definition of public figure as it had been articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) and *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). Second, it cannot be argued that these plaintiffs felt that the district court was found by the Court of Appeals decisions in *Hutchinson* and *Wolston*; *Hutchinson* came out of the Seventh Circuit and *Wolston* out of the District of Columbia Circuit. Under such circumstances, the parties are bound by their stipulation.

60 L.Ed.2d 115, 124 (1979). There must be clear and convincing evidence that the defendant either knew the material was false or "*in fact* entertained serious doubts" as to its accuracy. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968) (emphasis added).

[3] Mindful that the issue of actual malice is one of constitutional proportions, our review of the district court's order is not as limited as in most cases where a jury verdict has been set aside. Although we are not in a position to judge the credibility of witnesses, our duty is to make an independent examination of the evidence and determine whether there was a clear and convincing showing of actual malice. *Vandenberg v. Newsweek, Inc.*, 507 F.2d 1024, 1026–27 (5th Cir. 1975); *see Time, Inc. v. Pape*, 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L.Ed.2d 45, 50 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 198, 19 L.Ed.2d 248, 250 (1967).

[4] Pas-Point began operating in Jackson County on February 13. On February 18, Mike Shumaker, an EMS field representative, inadvertently came across the Pas-Point operation. On that day, Shumaker gave Pas-Point oral authority to operate and also issued temporary permits for its ambulances. It was not until March 31 that a formal written license to operate was issued and the ambulance attendants temporarily certified by the EMS.

Larry Arcell, co-author of the article, began his investigation into the Pas-Point matter after attending an April meeting of the Jackson County Board of

Supervisors at which there was some discussion about Pas-Point's radio equipment. In early May, Arcell spoke with the two primary sources of information for the article, Doyle Bradshaw, EMS' coordinator of field services, and Shumaker. Among the many aspects of Pas-Point operations discussed was the question of licensing. From these conversations, Arcell learned that Pas-Point had begun operating on February 13 and that the EMS first learned of their presence when Shumaker made his visit of February 18. It was during one of the conversations with Bradshaw that Arcell allegedly learned that Pas-Point did not receive a license until March 31. The week prior to publication, Arcell and his co-author, Robert Ellzey, had occasion to speak with Pas-Point's attorney, Robert Wilson, who disputed the accuracy of this information. Arcell and Ellzey decided that their information, having come from two EMS employees, was correct, and went ahead with the article despite Wilson's protests.

At the trial, Shumaker testified about discovery of Pas-Point's operation on February 18, and about his having given Pas-Point oral authority to operate. Shumaker testified that he thought he had told Arcell that Pas-Point had been given authorization to operate. That conversation, however, occurred after the article was published. Shumaker did not testify that he told Arcell about the oral authorization during their May conversation.[3]

Bradshaw testified that he told Arcell in early May that Pas-Point had been licensed since February 18. Bradshaw also testified that he had a difficult time explaining to Arcell the difference between service licenses, vehicle permits, and attendant certifications.

3. Almost all of Shumaker's testimony concerned the accuracy of the article.

Predictably, Arcell did not agree with Bradshaw's version of their conversation. He testified that when he wrote the story he had no doubts about its accuracy. Ellzey also testified that the article was believed to be accurate when written. Ellzey apparently had not had any contact with either Bradshaw or Shumaker.

The plaintiffs' attorney, Robert Wilson, questioned both reporters about the conversations he had with them prior to the publication date. The most relevant of these conversations was one he had with Ellzey the day before publication. Wilson contended that he read Ellzey a letter from Shumaker which stated that Pas-Point was authorized to operate as of February 18. Ellzey remembered the conversation, but testified that he did not recall having been read the portion of the letter pertaining to authorization.

The plaintiffs' case rested almost entirely on the testimony of Bradshaw and Wilson.[4] Theirs was the only testimony relating directly to the defendant's state of mind. There was no documentary evidence which showed that the defendants knew their article was false or entertained serious doubts about its accuracy. In sum, the jury was left to decide the case based on the conflicting accounts of the conversations described above. If the applicable burden of proof had been a preponderance of the evidence, a jury

4. Wilson did not actually get on the stand and testify. The trial judge allowed him to give his version of the conversations during his questioning of Arcell and Ellzey.

verdict either way would have to stand. Similarly, if liability could be imposed on a clear and convincing showing of negligence, we would be hard pressed to disregard the jury's verdict. We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence. This record simply does not contain clear and convincing evidence that the defendants knew that their information was incorrect or had a "high degree of awareness of . . . [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964).

Although the Constitution neither condones nor encourages careless journalistic practices, the journalist who merely is careless may not be held liable for defaming a public figure. That is because the interests we must consider in libel cases are not only those of the defamed and the defamer. If they were, the former would prevail with a greater degree of frequency. In all libel suits between a public figure and a publisher the public intervenes as a matter of right, and its interest must be considered. Only by limiting liability to those situations in which the publisher has acted with actual malice do we fully protect the public's right to the benefits of a free and uncensored press.

AFFIRMED.

Pas-Point Ambulance may have violated law

By LARRY ARCELL
and
ROBERT ELLZEY
SUN STAFF WRITERS

PASCAGOULA — Pas-Point Ambulance Service of Pascagoula may have violated state law during its first month of operation by failing to notify the state regulatory agency governing ambulance services of the company's existence.

Records of the emergency medical services (EMS) board of the State Board of Health show Pas-Point operated for about six weeks before receiving a temporary license to operate and had operated for four days before a chance visit by an EMS board field representative brought the discrepancy to light.

Company officials say Pas-Point is now operating within the guidelines of state statues.

Pas-Point is owned and operated by John and Janice Long of Mobile, Ala., who also own and operate Buddy's Ambulance Service in that city. The Long's have submitted a proposal to the Harrison County Board of Supervisors for the county's endorsement and tax dollars to operate a private ambulance service in the county. The supervisors have refused to make public the proposal, along with one by Mobile Medic Ambulance Service of Gulfport, because the information would be "confusing to the public," board president Ernest Melvin said last week.

"As far as coming into the state, yes, they were operating" illegally for four days because the state was not notified, said EMS coordinator Doyle Bradshaw.

Pascagoula attorney Roberts Wilson, representing the Longs, said the short notice given to the Longs by the Jackson County Board of Supervisors before Pas-Point began operating in the county was responsible for most of the problem.

"When you say they didn't have a license for four days, I know they didn't," Wilson said about not notifying state officials. "I don't think that makes a difference. They started working on it the fourth day and it just took them a little while to get it put together."

Pas-Point began operating Feb. 13, but the EMS board was unaware of the ambulance service until Feb. 18, when EMS field representative Mike Shumaker was informed of its existence while in Pascagoula.

PLEASE TURN TO PAGE A-4

State was not notified of Pas-Point operation

CONTINUED FROM PAGE A-1

Pas-Point was inspected by Shumaker on March 31 when he issued temporary permits for the vehicles and temporary permits for the ambulance attendants.

"It is the responsibility of the company to notify the board of health they are starting to operate," Shumaker said. "The (Jackson County) board of supervisors knew the problem and no one notified our office. No one called the office. The people in the county, the people responsible for ambulance service, did not notify us what was happening," he said.

Shumaker said that after he was informed of Pas-Point's existence, he went to its office and explained that "somebody should have contacted us." The state EMS board only has four field representatives to inspect the more than 130 ambulance services in the state, he said.

"I was there the day the guy (Shumaker) walked into the motel room they (Pas-Point) was operating out of," Wilson said. "He was just an nonconcerned (sic) as anybody I ever saw. He said don't worry, we'll straighten it all out."

Wilson defended Pas-Point's apparent negligence, saying, "I think we're pretty clean with this ambulance service. It's a little bit new . . . (and), we've had a few little problems like this license," he said. "They have people that are envious of them and mad at them."

Bradshaw said state law requires an ambulance company to obtain permits for all ambulance vehicles and have state-certified emergency medical technicians (EMTs) prior to operating. To be certified as an EMT, a person must be 18 years old, hold a valid state driver's license, have successfully completed an 81-hour EMT course and have passed the national EMT registry examination.

Pas-Point's ambulance attendants have not met the requirements of state law to be certified EMTs, but Bradshaw said they were permitted to work based on their completion of the Alabama EMT course. Shumaker said Pas-Point's attendants were allowed to work because the adoption of the national EMT exam requirement only took effect the first of this year.

"We had to take into consideration the training (and) new law," Shumaker said. "We have to bend and give a little to benefit the public."

Mrs. Long said Pas-Point's attendants have all successfully completed the first section of a two-part national registry exam. The second part was offered May 13, and Bradshaw said it would take 10 to 14 days to get the test results. After the results are compiled, the attendants must apply to the state for proper certification

According to state law, after Jan. 1, 1976, all ambulances "shall be occupied by at least one person who possesses a valid emergency medical technician's state certificate or medical/nursing license and a driver with a valid resident driver's license."

Bradshaw said that if only three or four of Pas-Point's attendants pass the national registry exam, he does not "know what we are going to come up with. Unless we catch them running without EMTs, (there is) nothing to do." If two or three attendants pass the test, they would have to be on duty 24 hours a day, "so you can see the problem," Bradshaw said. If no attendants pass the exam, Pas-Point would be "closed down," he said.

Bradshaw also said that with three state-certified METs, it would be difficult for Pas-Point to operate and there would be a good chance it would be violating state law. The state EMS board, he said, is considering putting two-way radios in the field representative's cars to monitor the ambulances' emergency frequency. The field inspectors could follow an ambulance to a hospital, he continued, wait for the patients to be admitted and then ask the ambulance attendant for his state certification card.

Shumaker said he inspected only one of Pas-Point's two ambulance units permanently stationed in Jackson County on March 31 because the other was in the repair shop. "One vehicle that wasn't checked could have had problems that I didn't see" since it was in the shop, he said, but he was not concerned about checking that vehicle because it had previously belonged to Mobile Medic and had been inspected earlier.

Shumaker said a complete inspection of Pas-Point's vehicles would be made before the service could be issued regular permits for the ambulance. Ambulance vehicles must be in compliance with the EMS board's 23-item check list, he said.

Ken Phillips, director of the Jackson County Disaster Emregency Services, said that "in order to meet the law's requirements and get them certified," he had been working with Pas-Point in equipping the ambulances.

Wilson said Friday that a letter from Shumaker, dated four days after the inspector talked with reporters, stated that Pas-Point's vehicles were issued temporary permits effective Feb. 18 and that the ambulance attendants were temporarily certified March 31, the date of the inspection.

Wilson also said Friday that he could not give out a copy of the Longs' proposal to the Harrison County Board of Supervisors. "The board of supervisors has requested that we not" release the information in the proposal for private ambulance service, Wilson said.

Supreme Court, U. S.
FILED
DEC 13 1980
MICHAEL RODAK, JR., CLERK

No. 80-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN LONG, JANICE LONG
and JACKSON COUNTY
EMERGENCY MEDICAL SERVICE, INC., d/b/a
PAS-POINT AMBULANCE SERVICE,
Plaintiffs-Petitioners,

versus

LARRY ARCELL, TIMOTHY F. KRIEHN,
ROBERT ELLZEY, and THE SOUTH
MISSISSIPPI SUN and THE BILOXI
HERALD, d/b/a THE SATURDAY
SUN HERALD, and GULF
PUBLISHING CO., INC.,
Defendants-Respondents.

Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

We consider both questions presented by the Petitioners to be false and misleading. Correctly redrafted, the sole question should be:

Whether the United States Court of Appeals for the Fifth Circuit correctly held the Petitioners to proof of liability by clear and convincing evidence in accordance with the *New York Times* actual malice rule?

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No. 80-811

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JOHN LONG, JANICE LONG
and JACKSON COUNTY
EMERGENCY MEDICAL SERVICES, INC., d/b/a
PAS-POINT AMBULANCE SERVICE,
Plaintiffs-Petitioners,

versus

LARRY ARCELL, TIMOTHY F. KRIEHN,
ROBERT ELLZEY, and THE SOUTH
MISSISSIPPI SUN and THE BILOXI
HERALD, d/b/a THE SATURDAY
SUN HERALD, and GULF
PUBLISHING CO., Inc.,
Defendants-Respondents.

Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *John Long, Janice Long, et al, v. Larry Arcell and Timothy F. Kriehn, individuals, et al,* 618 F.2d 1145 (5th Cir., 1980). Rehearing was denied on August 20, 1980. A copy of the Opinion is before this Court as Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioners seek to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1254(1). Petitioners have posed two questions for review, neither of which, in our opinion, would justify a review on certiorari. (Rule 17.1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners seek to invoke the provisions of the First Amendment to the Constitution of the United States of America.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . .

STATEMENT OF THE CASE

The review of the facts presented in the Opinion of the United States Court of Appeals for the Fifth Circuit (Appendix "A" to the Petition) are adopted by the Respondents in the interest of brevity. Also for the sake of brevity, any portion of the Petitioners' statement of the case which is subject to more than one interpretation is fully developed in the body of the Respondents' argument.

REASONS FOR DENYING THE WRIT

No questions of substance are presented by Petitioners' assertions of denial of their rights. They have shown no special or important reason for granting the writ, and the United States Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with the decision of another federal court of appeals on the same matter; has not decided a question already settled by this Court; and has not departed from accepted and usual courses of judicial proceedings, to call for supervision by this Court.

ARGUMENT

Introduction

The Petitioners contend that the Fifth Circuit Court of Appeals applied a standard for the determination of

the existence of actual malice in a *New York Times*[1] defamation action which conflicts with the decisions of this Court. Petitioners have, in effect, requested an advisory opinion from this Court, for they now attempt to state that they are "private figures" and that the standard of *New York Times* does not apply to them. At the same time they request this Court to rule that the Fifth Circuit applied an erroneous standard of *New York Times* review, which they contend does not apply to them. If the Petitioners are not "public figures," the standard of review imposed by the Fifth Circuit was inapplicable. If they are "public figures" the second issue posed for review need not be reached.

In any event, there is only one issue properly before this Court: Whether the United States Court of Appeals for the Fifth Circuit correctly held the Petitioners to proof of liability by clear and convincing evidence in accordance with the *New York Times* actual malice rule. Consideration of this issue presupposes an inquiry into whether the Appellate Court correctly applied the *New York Times* rule in its independent examination of the evidence.

The Question:
Whether The United States Court Of Appeals For The Fifth Circuit Correctly Held The Petitioners To Proof Of Liability By Clear

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1 *New York Times v. Sullivan*, 376 U.S. 254 (1964).

And Convincing Evidence In Accordance With The *New York Times* Actual Malice Rule.

The Fifth Circuit assumed that the Petitioners were public figures when the article was written for the clear reason that Plaintiffs, through their attorney, so stipulated at trial. Petitioners advanced the argument that they should be relieved of this stipulation. Petitioners do not, however, set forth the correct sequence, nor indeed the setting, in which this "stipulation" was made. (Petition for Writ of Certiorari @ 22).

Plaintiff's original Complaint alleged that Defendants Arcell and Kriehn acted with actual malice. In the Answers filed by the various Defendants, the Defendants raised affirmatively the issue of whether the Plaintiffs were public figures. The affirmative defenses, for the sake of brevity set forth that the Plaintiffs were limited-purpose public figures. The Defendants also raised in the Joint Pre-Trial Order as a contested issue of law whether the Longs were public or private figures. The Plaintiffs did not list as a contested issue of law whether the Longs were public or private figures.

As further background for Counsel's concession that the Plaintiffs were public figures, it should be noted that Plaintiffs' case in chief was tried on the theory that Petitioners were public figures. Although the voir dire and opening statements are not of record, during the

argument on Defendants' Motion for Directed Verdict made at the close of Plaintiffs' case in chief, is found the following:

> Your Honor, also as to the third grounds for the motion, is the degree of proof involved here. Mr. Wilson announced prior to voir dire and in his opening statement that he was going to prove that the Longs were public figures and still prove libel. As Your Honor knows, in that case, he can only recover upon clear and convincing proof that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for its truth. That's also the same standard on Plaintiffs' punitive damages. Your Honor, that clear and convincing standard of proof has not been met. (R. 566).

These assertions are unrebutted in the record.

In the ruling on the motion, is found the following:

* * *

BY THE COURT:

> Neither side argued the question or alluded to the question of whether the plaintiffs are public or private figures, which I think is a very important and crucial question in this case. If

there is a question as to whether they were private or public figures.

It is my understanding — correct me if I am wrong, Mr. Wilson, that plaintiffs concede they were 'public figures,' within the meaning of the law . . . and I ask you if you contend they were private as opposed to public figures, or whether you concede for the purposes of the record that they were public figures, within the meaning of the law?

BY MR. WILSON:

Judge, I think if they are not public figures they come as close as you can to being public figures without being public figures. There are some cases I have found of the district courts, in the Federal Supplement, not to put it off on the district courts, of course, where it tends to indicate this. I would think in this case that it is a question. I would think it questionable but I don't think it is highly questionable in this case whether or not they were public figures. That's the reason I was reading out of St. Amant, which is a public figure case about recklessness and doubting the accuracy.

BY THE COURT:

All right, do you concede then, for the purposes of the record that they were 'public figures' as opposed to 'private figures or individuals?'

BY MR. WILSON:

> Yes, Sir, I will concede that for the purposes of the record. (R-578-579).

Although the trial court did rule that its holding would have been that the Plaintiffs were public figures, this holding is thus placed in perspective. The Plaintiffs' theory on which this case was tried, was that they were public figures. This conclusively appears from the Pre-Trial Order, the voir dire, the opening statement, the argument on Defendants' Motion for Directed Verdict made at the close of Plaintiffs' case in chief, and the lack of applicable objection to the jury instructions.

Plaintiffs' theory and concession, occurring prior to the Defendants' case, thus prevented the Defendants from presenting proof on their affirmative defenses that Plaintiffs were public figures.

The issue attempted to be raised by Petitioners is thus false and misleading. It is not whether Plaintiffs may be relieved of their stipulation that they were public figures, but rather, whether it is a miscarriage of justice to allow a defeated litigant to abandon the theory of the case upon which the action was tried, and attempt to cause the district court to be placed in error on an issue neither raised nor appropriately submitted for a determination in the court of first resort.

The general answer to the restated question is found in *Miller v. Avirom,* 384 F.2d 319 (D.C. Cir., 1967):

> . . . By our current appraisal, the question appellant poses is sufficiently substantial to command serious attention if properly presented for our decision. But because the issue was neither raised nor decided in the District Court, we do not address it on this appeal or intimate any view as to how it should be resolved.
>
> In our jurisprudential system, trial and appellate processes are synchronized in contemplation that review will normally be confined to matters appropriately submitted for determination in the court of first resort. Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal. Canons of this tenor reflect, not obeisance to ritual, but "considerations of fairness to the court and the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. The injunction that trial ventilation precede appellate exploration best subserves that policy without appreciable imposition upon the litigants. It requires them to deal

> fairly and frankly with each other and with the trial tribunal with respect of their controversies. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation . . . 384 F.2d 321-322 (footnotes omitted).

The instant Petition presents Petitioners' third theory upon which liability is sought to be imposed. In the trial court, Petitioners' theory was that they were public figures. On appeal they contended that they relied on the Court of Appeals decision in *Hutchinson*[2] and *Wolston*,[3] both of which were reversed by the Supreme Court.[4] This of course was an impossibility, as the Courts of Appeals' decisions in both cases, occurred after the trial of this cause.[5] Petitioners did request that they be relieved of their stipulation of being public figures because of "a mistake of law induced by the then existing state of the case law." *Logan Lumber Co. v. Commissioner of Internal Revenue*, 365 F.2d 846, 855 (5th Cir. 1966). Finding no success in their second theory, Petitioners now abandon their theory that they were induced by the existing state of the law by arguing that

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2 *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978).

3 *Wolston v. Readers Digest Ass'n, Inc.*, 578 F.2d 427 (D.C. Cir., 1978).

4 *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

5 The instant trial took place from February 28, 1978 through March 3, 1978. *Wolston* was decided by the Seventh Circuit on May 23, 1978, and *Hutchinson* was decided by the District of Columbia Circuit on June 30, 1978.

the stipulation was one of law, and that *Hutchinson* rendered them private individuals.

These changing theories are advanced absent a reason for a reviewing Court to consider an issue raised by the first time on appeal. Courts of Appeals lack original jurisdiction and are unequipped to handle trial functions. Thus, appellate review is, of necessity, conducted on the record made in the trial court. *Miller v. Avirom*, 384 F.2d 319, 321 n.8 (DC Cir., 1967).

> . . . Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the Court below. Almost every case would be in effect tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved. *Id.*, n.11 @ 322 (citations omitted).

As previously set forth, this issue was not properly raised before the trial court in the Pre-Trial Order, or in Plaintiffs' case in chief. It is, thus, inappropriate for appellate review. *Associated Press v. Cook*, 513 F.2d 1300 (10th Cir., 1975). The orderly disposition of cases requires that parties relying on a factual position make that position known to the trial court so that evidence may be proffered and rulings made thereon. As a general rule, a reviewing court will not reverse a trial court on a position never properly presented to it. *Walker v. Continental Life and Accident Company*, 445 F.2d 1072 (9th

Cir., 1971). There are, certain exceptions to this rule, as where a pure question of law is involved and a refusal to consider the issue raised for the first time on appeal would result in a miscarriage of justice. *Evans v. Triple R. Welding and Oil Field Maintenance Corp.*, 472 F.2d 713 (5th Cir., 1973).

This general rule has been repeatedly recognized by this Court, which explained that its essential purpose was that a party might have the opportunity to present all the evidence it believes relevant to the issues, and in order that a litigant might not be surprised on appeal by a final decision of issues upon which it has had no opportunity to introduce evidence. This Court further held that the decision of what issues might be taken up and resolved for the first time on appeal is left primarily to the discretion of the court of appeals. *Singleton v. Wulff*, 428 U.S. 106 (1976).

The decision of the Fifth Circuit is in accord with the various circuits, and indeed, with the applicable decisions of this Court. Petitioners have shown nothing to distinguish this case from the general rule that a trial court may not be placed in error on an issue not properly submitted to it for determination, nor have they shown an abuse of discretion by the Fifth Circuit. Clearly, Petitioners had the opportunity to preserve this issue for appeal. Having specifically waived the issue, by proceeding on their chosen theory that they were public figures, it would be a clear miscarriage of

justice-to allow Petitioners another day in court because they now contend, that if a different standard of liability were imposed, they might prevail. *See: Miller v. Avirom, supra.*

The manifest injustice to the Respondents, and indeed the entire judicial system, is readily apparent if such dispensation were permitted.

Petitioners also claim the Fifth Circuit has applied an erroneous standard for the determination of actual malice. This contention is evidently based on Petitioners' failure to grasp the issues. Such failure is illustrated by the following language:

> . . . Whether a standard for the determination of actual malice, which prevents a public figure defamation plaintiff from recovering where there is evidence of knowing and reckless falsity, conflicts with the decisions of this Court. (Petition for a Writ of Certiorari at 1.)

Petitioners' language should conclusively and by itself, establish that the Writ should be denied. The question of whether the evidence offered by a public figure defamation plaintiff on the issue of "actual malice" satisfies the "convincing clarity" standard is not merely to see whether there is *any* evidence on the issue, as Petitioners seem to suppose. The question is whether the evidence presented possesses the "convincing clarity" demanded by the Constitution, and this

is a question of law for the Court after its own personal "do novo review" of the facts.

In a misleading effort to demonstrate that the evidence ". . . clearly and convincingly supports the finding on *New York Times* actual malice . . ."[6] the Petitioners purported recitation of the alleged evidence takes evidence out of sequence and context and is characterized by omissions and misrepresentations. Space does not permit the Respondents to set forth all of the deficiencies in Petitioners' alleged recitation of the evidence. The opinion of the Fifth Circuit correctly sets forth the sequence of events.

Briefly expounding upon the evidence, set forth therein, it should be noted that Arcell, the original author of the article at issue, contacted Petitioners to obtain their response to the statements of Bradshaw and Shumaker, representatives of the Emergency Services Division of the State Board of Health. Arcell was referred to their attorney, Mr. W. Roberts Wilson. Arcell contacted Mr. Wilson on May 7, 1976. (R 382). On the same date, Mr. Wilson again telephoned Arcell and asked for another reporter, Robert Ellzey. (R 385-86). Thereafter, Mr. Wilson did not talk to Arcell. Apparently, Mr. Wilson asked that Ellzey be assigned to the story because of their previous relationship. (R 455). Ellzey had been in Wilson's office on several occasions, and Wilson was in fact one of Ellzey's sources

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6 Petition @ 6.

of information concerning the Jackson County Board of Supervisors. (R 430-31). Wilson felt that Ellzey would listen to what he said and that he would be fair. (R 455). Ellzey talked to Wilson on several occasions, and also talked to Janice Long.

Although Arcell first communicated with Bradshaw on May 6, 1976, the license was not mailed to the Petitioners until May 10, 1976, four days after Arcell talked to Bradshaw. Arcell talked to Mr. Wilson on May 6, 1976, in which Mr. Wilson allegedly disputed the facts surrounding the issuance of the license. Wilson's dispute occurred while he was in Idaho, without his clients' file. (R 387). At this time, the license had not been issued, and was not in fact received by Mr. Wilson until May 11, 1976, five days after the initial conference with the Defendant Arcell. Defendant Ellzey talked with Mrs. Long on May 12, 1976. Although she allegedly informed Ellzey that they were licensed, she never received the license and never had it in her possession. (R 114). Incredibly, Mrs. Long applied for the license in dispute on May 13, 1976, which was the day after she allegedly informed Ellzey that they were licensed. (R 96, 216).

Turning now, to the misrepresentations and omissions contained in the Petition, a few glaring examples should conclusively demonstrate the false and misleading tactics of Petitioners.

> . . . Both state officials [Shumaker and Bradshaw] testified that they advised the reporters that the Plaintiffs were licensed on February 18. (R 208, 254) . . . (Petition @ 3)

The cited record does not establish what Petitioners claim. In fact, Mr. Shumaker testified that the article in question was correct. (R 226-27)

Mr. Bradshaw testified:

> Q. Did you tell Mr. Arcell that the license was issued February 18th, 1976?
>
> A. *Yes* (R-272) (emphasis added). Mr. Bradshaw further testified:
>
> Q. Is there any possibility that you would have told him, "Our records reflect that Pas-Point Ambulance Service operated for six weeks without a license"?
>
> A. No.
>
> Q. Is there any possibility that you would have told him any other license date other than February the 18th, 1976?
>
> A. No, I would not.
>
> Q. Is there any possibility you told him that you gave him a temporary license?
>
> A. No. (R. 274-75) (Petition @ 7-8).

While the quotes are accurate, the following cross

examination of Mr. Bradshaw clearly sets forth the lack of basis for his testimony.

Q. When was the license for Pas-Point Ambulance Service issued?

A. On February 18, 1976.

Q. You have the file in front of you?

A. Yes.

Q. Would you show me in there where—

A. —Well, let me say this. I do not have — I have a document in the file showing the date that Mike Shumaker gave the authority for the license on February the 18th.

Q. Do you have a memorandum from Mr. Shumaker in your file?

A. A memorandum?

Q. Yes, saying that he gave them a license on February 18th?

A. No, I do not.

BY THE COURT:

When was that document you are referring to prepared and by whom?

BY THE WITNESS:

O.K., the copy of the license, the document is prepared, our procedures in our office is that once the field men come in from the field, after

inspections, they turn the information that they have over to the secretaries who process these licenses and I can not honestly say when this document was issued. (R. 276-277).

* * *

Q. Did you make any contemporaneous memoranda of your conversation with Mr. Arcell?

A. No, I did not. (R. 302).

* * *

Q. Do you know how long the Pas-Point Ambulance Service operated before they had a license?

A. Only hearsay. We do not know definitely, No.

Q. O.K. Do you know when the written license was issued?

A. The written license, the written documents?

Q. Yes.

A. No, I do not. (R. 284).

The apparent crux of Petitioners' contention that the Fifth Circuit applied an erroneous actual malice standard is as follows:

1. The alleged facts had been denied by the Plaintiffs' counsel. (Petition @ 11).

2. The alleged facts had been expressly repudiated prior to publication by the Defendant's sources, i.e., the state officials. (Petition @ 11, 13 and 15).

Petitioners' first argument appears to be that since the facts concerning the license were in dispute, the Defendant reporters should have rechecked their facts prior to publication. Apparently, since Plaintiffs' attorney disputed the facts of the article this somehow gave greater credence to the denial. However, liability under the "clear and convincing proof" standard of the *New York Times* Rule cannot be based upon mere denials, however vehement. *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (7th Cir. 1977). As the District Court for the Northern District of California recently stated, "if potential Plaintiffs in libel suits could cut off a malice defense simply by calling a newspaper and giving a broad denial of an article, the First Amendment policy embodied in *New York Times* would be undermined." *Trans-World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (N.D. Cal. 1977). Citing *Marietta Corp. v. Evening Star Newspaper*, 417 F.Supp. 947 (DDC 1976).The facts of *Trans-World Accounts, Inc. v. Associated Press, supra.*, are especially appropriate to the case at bar. In that case, a denial by an officer of the Plaintiff and a written demand for correction by Trans-World attorneys were deemed insufficient to supply the requisite proof of knowledge of falsity or awareness of probable falsity.

The lack of basis for Mr. Wilson's denials have been previously set forth, i.e., the fact that Wilson's dispute

occurred while he was in Idaho without his clients' file, the fact that the license was not received until four days after he disputed the information with Arcell, and the fact that the license was not shown to the Defendants until after the publication of the article.

Mr. Shumaker, one of the sources, testified that the article was correct. (R. 226-27). While Mr. Bradshaw testified at trial that he informed Mr. Arcell that the license was issued on February 18, 1976, the credibility of the publisher's information must be judged

> . . . not on the basis of an evaluation of sworn testimony at a trial (after full opportunity to rebut accusations), but rather on the basis of information available to the reporter at the time of publication. *Kidder v. Anderson*, 354 So.2d 1306 (La. 1978).

The record, as a whole, thus establishes that there was no knowledge of falsity, if indeed there is a falsity, no serious doubt concerning the truth of any of the passages in the article, and certainly no reckless disregard of whether the passages in the article were false. *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977). The reporters and editor entertained no serious doubts as to the truth of the publication, and, even after an evaluation of sworn testimony, it is impossible to establish the falsity of the article. They could not try the case before publication. *New York Times* also protects against self-censorship in that publishers, if exposed broadly to lia-

bility to defamation, might well engage in self-censorship. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir. 1978).

> . . . such self-checking could be expected to follow as much from the threat of a sanction as from the actual enforcement of one, for not only is it frequently difficult to prove the truth of a defamatory communication, but also the risk incurred in attempting to establish truth before fallible juries or judges is considerable. *Id.* @ 506-507 (footnotes omitted).

Plaintiffs have confused negligence, failure to investigate, and other alleged failures with the knowledge of falsehood or awareness of probable falsehood. They have not sustained their burden. What conceivable clear and convincing evidence does this record contain of awareness by the reporters and editor of probable falsity?

The review imposed by the Fifth Circuit was actually beneficial to the Petitioners. The Fifth Circuit assumed for the purposes of appeal that the article was false, even though Petitioners acknowledge ". . . A document evidencing the plaintiffs' right to operate was issued on March 31. . . ." (Petition @ 3).

Although the Fifth Circuit assumed the article was false, the testimony of Michael Shumaker and Doyle Bradshaw clearly established that the date as to when

Pas-Point Ambulance Service was licensed, is incapable of independent verification, for the records of the Emergency Medical Services Division of the State Board of Health contain no such information. (R. 277, 284, 221-222, 223). Since the date of license was incapable of verification and there was no convincing indicia of unreliability, publication of the article cannot constitute reckless disregard for the truth. *Hotcher v. Castillio-Puchae*, 551 F.2d 910 (2d Cir. 1977) cert. denied, 434 U.S. 834, 98 S.Ct. 120 (1977).

Of course, the barrier imposed by the *New York Times* Rule does not go to the truth or falsity of the published statement, but rather to the basic issue of whether the article was published with actual malice. The Fifth Circuit correctly held that the ultimate issue is not the falsehood of defamatory statements, it is whether a reporter and an editor publish with actual malice, i.e., with reckless disregard of whether such statements were false or not.

The opinion of the Fifth Circuit concludes its review of the evidence in the light most favorable to Petitioners:

> The Plaintiffs' case rested almost entirely on the testimony of Bradshaw and Wilson. Theirs was the only testimony relating directly to the defendant's state of mind. There was no documentary evidence which showed that the defendants knew their article was false or

> entertained serious doubts about its accuracy. In sum, the jury was left to decide the case based on the conflicting accounts of the conversations described above. If the applicable burden of proof had been a preponderance of the evidence a jury verdict either way would have to stand. Similarly, if liability could be imposed on a clear and convincing showing of negligence, we would be hard pressed to disregard the jury's verdict. We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence. This record simply does not contain clear and convincing evidence that the defendants knew that their information was incorrect or had a 'high degree of awareness of . . . its probable falsity.' *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964), 618 F.2d 1148 (footnotes omitted).

Petitioners do not dispute the conclusion that, although the evidence was conflicting, there was no documentary evidence which showed the Defendants acted with actual malice. In fact, with one exception not germain to the issue of actual malice,[7] Petitioners do

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7 Petitioners state ". . . that the Fifth Circuit's statement that Shumaker's conversation 'occurred after the article was published,' 618 F.2d @ 1148, is not supported by the record. While the record is not as clear as it could be as to the sequence of events, it does clearly show that the conversation between Arcell and Shumaker occurred prior to the May 15th publication date. . ." (Petition @ 8).

Petitioners' distinction actually undermines their position, as Shumaker testified at trial that the article was correct. *Supra* @ 13.

not challenge the Fifth Circuit's review of the evidence. It is not appellate review that is at issue; the issue is whether Plaintiffs proved, by clear and convincing evidence that the Defendants published false and libelous charges against the Plaintiffs which were known to be false, or about which the Defendants had serious doubts as to truth, with intent to harm through falsehood.

The record simply does not contain such proof. We apologize to the Court for the length of this Brief, but we felt mandated to correct Petitioners' false and misleading tactics. The Fifth Circuit affirmed the judgment notwithstanding the verdict because clear and convincing proof of liability is not in the record. Petitioners' attempt to demonstrate liability has failed, as the requisite proof is not there.

CONCLUSION

The jury in the trial below returned a verdict against all of the Defendants and assessed the Plaintiffs' actual damages at Fifty Thousand Dollars ($50,000.00), and punitive damages at Eighty-Five Thousand Dollars ($85,000.00). Thereafter, Judgment notwithstanding the verdict was entered for all of the Defendants.

The very size of the jury verdict is a classic example of the necessity for the *New York Times Rules-New York Times v. Sullivan*, 376 U.S. 254 (1964) and succeeding

cases including *Curtis Publishing Company v. Butts,* and *Associated Press v. Walker,* 388 U.S. 130 (1967) and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). The One Hundred Thirty-Five Thousand Dollar verdict illustrates drastically what happens when the jury is allowed to speculate on damages for alleged libel involving public figures.

The rights of the public intervene in every libel action brought by a public figure. This is an indisputable truth of constitutional law. The jury, favoring the individual litigants, cannot be permitted to override the greater public or national interests. It is within the peculiar province of the Court to safeguard these higher rights.

Clear and convincing evidence of actual malice is simply not present here. Justice demands that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I, W. JOEL BLASS, of the firm of Mize, Thompson & Blass, attorneys of record for the Defendants, do hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the above and foregoing Brief In Opposition to Honorable W. Roberts Wilson, Attorney for Petitioners, at his usual and customary post office address, P.O. Box 1507, Pascagoula, Mississippi 39567; and three true and correct copies of the above and foregoing Brief In Opposition to Honorable Gary L. Roberts, attorney for Petitioners, at his usual and customary post office address, P.O. Box 237, Pascagoula, Mississippi 39567.

I further certify that all parties required to be served have been served.

This, the ____ day of December, 1980.

W. JOEL BLASS